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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-734

THE INGALLS IRON WORKS COMPANY,
Appellant,

vs.

NICK P. CHILIVIS, COMMISSIONER,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE SUPREME
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MOTION TO DISMISS OR AFFIRM

Appellee Nick P. Chilivis, State Revenue Commissioner of Georgia, moves the Court to dismiss the appeal in this case on the ground that it does not present a substantial federal question, or, in the alternative, to affirm the judgment of the court below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

The essential facts of this case are set out in the opinion of the court below. See Ingalls Iron Works Co. v. Chilivis, 237 Ga. 479, ___ S.E.2d ___ (1976). Appellee would, however, clarify the statement of the case presented by Appellant.

First, Appellee would point out that the only issue involved in this case is Appellant's equal protection attack. The interstate commerce clause argument originally raised by Appellant in the trial court was not pursued by Appellant in the Georgia Supreme Court and is not made an issue in Appellant's Jurisdictional Statement.[1]

Second, as the lower court found,

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[1] See Ingalls Iron Works Co. v. Chilivis, 237 Ga. 479, ___ S.E.2d ___ (1976). Further, the instant tax being upon a use in Georgia of tangible personal property after it has come to rest in Georgia, an interstate commerce clause argument would not be appropriate in the matter in any event. See, e.g., McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 47 (1940); Henneford v. Silas Mason Co., 300 U.S. 577, 582, 587 (1937).

Appellant is engaged not only in the business of a contractor (erector of structural steel), but also in the business of manufacturing-selling (fabricated steel). In addition, Appellant combines these activities at times and engages in contracts to both fabricate and provide structural steel and then to erect the same structural steel for a customer. It is the transactions involved in this last type of activity which are the subject of the provision of the Georgia tax act involved in this case.

Contrary to Appellant's assertion at page 5 of its Jurisdictional Statement, all "dual operators", i.e. fabricator-erector, are taxed in the same manner under the Georgia act, paying upon the fair market value of the fabricated steel at the time of use for erection. See Ingalls Iron Works Co. v. Chilivis, supra, 237 Ga. at 482.

Therefore, contrary to Appellant's statement of the issue as being whether or not the State of Georgia may treat similarly situated taxpayers differently, the actual and precise issue is whether or not the State of Georgia may properly classify "dual operators", who are all treated identically subsequent to classification, separately from other taxpayers engaged in part but not all of the same activities engaged in by the "dual operators".

ARGUMENT

The following argument is submitted in support of both Appellee's motion to dismiss and his alternative motion to affirm and to establish that there is not a substantial federal or other question involved herein so as to require further argument.

A. THE GEORGIA STATUTORY SCHEME

The Georgia Retailers' and Consumers' Sales and Use Tax Act, Ga. Laws 1951, pp. 360, et seq., as amended (Ga. Code Ann. Ch. 92-34a), basically imposes two types of transaction taxes: one, a sales tax on all purchases and sales of tangible personal property at retail in the State, Ga. Laws 1951, pp. 360, 362, as amended (Ga. Code Ann. § 92-3402a(a)) (citations hereafter to Ga. Code Ann.); and two, a use tax on the first instance of use, consumption, distribution or storage in Georgia of tangible personal property purchased at retail outside Georgia, Ga. Code Ann. § 92-3402a(b). Broadly stated, a person who sells tangible personal property in Georgia is a "dealer", Ga. Code Ann. § 92-3404a, and a person who uses items of tangible personal property purchased by him for use in fulfilling service contracts in Georgia is a contractor, Ga. Code Ann. § 92-3448a. The base for the sales tax imposed on a dealer is the sales price,

Ga. Code Ann. §§ 92-3402a(a), 3403aE; and the base for the tax imposed on contractors is the purchase price of the raw materials used by them in fulfilling their contracts, Ga. Code Ann. § 92-3448a.

Under the Act manufacturers are generally treated as dealers who are in the business of manufacturing articles for sale. Thus, when they sell such items in Georgia the sales tax is due, and when items they sell outside the State are brought into the State and used in the State, the use tax is due. The situation of dual operators like Appellant, however, who both process and sell and process and use tangible personal property, combines aspects of both dealers and contractors. A reading of the provision of the Georgia act in question in the instant case, Ga. Code Ann. § 92-3410a(b), shows that what the legislature has done is create a special category and method of taxation for dual operators (though the term "dual operators" is a colloquial one and not actually used by the statute itself).

Section 92-3410a(b) deals with a taxpayer who engages in three distinct operations: fabricating, selling its fabricated articles, and using its fabricated articles itself. It imposes a use tax, and provides the basis for computing the tax, when a person who is engaged in

the business of selling articles of tangible personal property which he has processed, manufactured or converted from industrial materials into such articles, makes some use of such a fabricated article other than selling it or retaining, demonstrating or displaying it for sale. Such a use is treated as being in effect in lieu of a sale and is deemed to be a retail sale. The tax is a use tax, however, and its incidence is upon the first use of fabricated articles by such a person apart from preparation for sale.

When the section is read in pari materia with the general use tax provision, Ga. Code Ann. § 92-3402a(b), it is clear that the first use referred to by section 92-3410a(b) means first use in Georgia, and the basis for computation of the tax at that time is fair market value. The tax imposed by the statute and assessed by Appellee in this case was, therefore, imposed not on any aspect of interstate commerce but upon Appellant's use of the fabricated steel in Georgia.

The Georgia Supreme Court recognized, and the record below substantiates, that all persons coming within the terms of the classification for dual operators contained in section 92-3410a(b) are taxed in precisely the same manner. The reason for the separate classification of dual operators is

evident from the history of the State of Georgia's bout with the instant taxpayer.

In 1967 Appellee attempted to tax Appellant along the lines involved in this case, i.e. upon purchase price plus fabrication costs, in operations similar to those involved in this case. The Georgia Court of Appeals struck down that assessment, finding no authority for it under the Georgia statute as then written, though acknowledging that its decision necessarily resulted in an actual disparity in taxation. See Hawes v. Ingalls Iron Works Co., 117 Ga. App. 80, 159 S.E.2d 434 (1968). Under that decision a contractor who purchased fabricated articles for use in fulfilling his construction contracts paid sales tax on his purchase price, which included fabrication labor costs. However, while a contractor who fabricated his own articles of personal property which he used in fulfilling his construction contracts also paid sales taxes on his purchase price, his purchase price did not include the added value of fabrication labor costs. See 117 Ga. App. at 83. The Legislature of Georgia has through section 92-3410a(b) alleviated this disparity in taxation between dual operators and other contractors by creating the special classification for dual operators and thus alleviating the competitive advantage previously enjoyed by them. Section 92-3410a(b) also relieves any

disparity in taxation between out-of-state dual operators and in-state dual operators by taxing the uses of each on the same basis, i.e. fair market value at the time of use (in Georgia).

As will be discussed hereafter, such classification does not violate equal protection of the laws.

B. THERE IS NO VIOLATION OF EQUAL PROTECTION, BECAUSE ALL DUAL OPERATORS ARE TREATED EQUALLY AND THE CLASSIFICATION IS NOT WITHOUT A RATIONAL BASIS

As discussed in the preceding part of this argument, there is no disparity in the tax treatment of dual operators. Thus the requirement of uniformity of treatment for persons similarly situated is satisfied by the Georgia statute. See generally Reynolds v. Sims, 377 U.S. 533, 565 (1964). The Georgia statute also satisfies the equal protection requirement of there being a rational basis for the classification.

In the area of taxation, this Court has long recognized and consistently recognized that state legislatures have extremely broad discretion in classifying for the purposes of fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. See, e.g., Madden v.

Kentucky, 309 U.S. 83, 88 (1940), wherein the Court stated:

> "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. [footnote omitted] The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." 309 U.S. at 88.

Thus, the burden is on Appellant to negative every conceivable rational basis, which, under the other decisions of this Court, cannot be done.

Classification by state legislatures for purposes of taxation is afforded such leeway that a state tax law will not be invalidated if the classification is based upon any reasonable distinction or difference in state policy. See, e.g., Kahn v. Shevin, 416 U.S. 351, 355 (1974);

Clark v. Paul Gray, Inc., 306 U.S. 583, 595 (1939); Brown-Foreman Co. v. Kentucky, 217 U.S. 563, 573 (1910).

Thus it has been repeatedly held that the equal protection clause does not prevent a state from classifying businesses for tax purposes and imposing different taxes upon different trades, professions and occupations or taxing them at different rates. See, e.g., Lehnausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973); Caskey Baking Co. v. Virginia, 313 U.S. 117, 121 (1941); Brown-Foreman Co. v. Kentucky, supra.

For this reason it has been held, due to the broad discretion of the legislatures and the lack of any iron rule of equality in the field of taxation, that the difference in the classes need not be great, and even narrow distinctions, if reasonable, are sufficient to justify the classification, see, e.g., New York Rapid Transit Corp. v. New York, 303 U.S. 573, 578 (1938); State Board of Tax Comm'rs of Indiana v. Jackson, 283 U.S. 527, 538 (1931); and the classification will be upheld if any state of facts can reasonably be conceived to justify it, see, e.g., Dandridge v. Williams, 397 U.S. 471, 485 (1970), McGowan v. Maryland, 366 U.S. 420, 426 (1961), New York Rapid Transit Corp. v. New York, supra at 578, State Board of Tax Comm'rs of Indiana v.

Jackson, supra at 537. See generally Austin v. New Hampshire, 420 U.S. 656, 661, 662-63 (1975).

Therefore, numerous acts involving classifications of corporations for tax purposes have been upheld by this Court as against equal protection attacks. See, e.g., Alaska v. Arctic Maid, 366 U.S. 199, 204 (1961) (freezer ships classified separately from local fishers and canners); Caskey Baking Co. v. Virginia, supra at 119 (in a situation similar to the instant case, peddlers classified separately from other merchants); Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72, 76 (1939) (act discriminating in favor of trucks not for hire over those for hire); New York Rapid Transit Corp. v. New York, supra at 579, et seq. (utility; discussing a number of cases in this area and ruling that freedom from competition is sufficient for a heavier tax burden); State Board of Tax Comm'rs of Indiana v. Jackson, supra at 538 et seq. (tax treatment of chain stores differently from other mercantile stores not unconstitutional; discussing a number of cases in the area).

Applying these principles to the instant case, it is apparent that the Georgia statute does not violate equal protection. Instead of creating a disparity, the Georgia statute alleviates an

economic disparity which previously existed to give dual operators a competitive advantage over other erectors of structural steel. The combined business activities of dual operators provide a sufficient distinction from mere contractors or mere fabricators to treat them separately. The distinct treatment of chain store operations over single retail operations upheld in State Board of Tax Comm'rs of Indiana v. Jackson, supra, is a good analogy, as is the statutory scheme involving the peddlers in the case of Caskey Baking Co. v. Virginia, supra. In addition, the legislative policy of the elimination of the competitive advantage of dual operators over mere contractors is a reasonable and sufficient basis under the cases discussed above for upholding the classification.

Thus, it is not possible for Appellant to negative every conceivable basis or to prove the lack of any facts sufficient to sustain the classification, and the Georgia statute is not violative of equal protection. See, e.g., Dixie Ohio Express Co. v. State Revenue Comm'n, supra at 78.

CONCLUSION

For all of the foregoing reasons Appellant's equal protection attack upon the Georgia statute is without merit.

This being apparent from the prior decisions of this Court, the instant appeal does not present a substantial federal question nor a question needing further argument. See Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952); Congress of Industrial Organizations v. McAdory, 325 U.S. 472, 477 (1945); Patterson v. Stanolind Oil & Gas Co., 305 U.S. 376, 379 (1939). Therefore, Appellee respectfully urges the Court to grant his motion and to dismiss the appeal or, in the alternative, to affirm the lower court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, H. Perry Michael, one of the attorneys for Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served Appellant with three copies of the foregoing Motion to Dismiss or Affirm by depositing same in the United States mail, with first class postage prepaid, addressed to counsel for Appellant, to wit:

Mr. James M. Crawford
3000 First National Bank Tower
Atlanta, Georgia 30303

This _____ day of December, 1976.

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